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New Governance Regulation and Lawyers: When Substantive Compliance Erodes Legal Professionalism

Abstract

A dominant theme within institutional theory is that organizational responses to regulatory demands will be characterised by decoupling. However, this assumption rests on regulation as a coercive force. The emergence of ‘new governance regulation’ and the freedom afforded to firms to tailor regulatory demands to local circumstances should, theoretically, foster greater commitment to, achievement of, regulatory goals. Focusing on the responses of solicitor practices in England and Wales to outcome-focused regulation, this paper explores the extent to which the flexibility of NGR triggers substantive compliance. Drawing on multiple data sources, we find that law firms made significant investments in compliance infrastructures and developed strategies to integrate compliance into work structures and day to day activities. Whilst their responses indicate substantive compliance, core regulatory goals were only partially met.

INTRODUCTION

The question of how organisations, such as professional services firms (PSFs), respond to complex forms of regulation and demands for accountability continues to provoke debate and controversy (Ramakrishna et al., 2017). Much of the extant literature draws on the notion of coercive isomorphism, emphasising regulated organizations' limited autonomy (Raaijmakers et al., 2014), and loss of legitimacy when non-compliance is detected (Scherer et al., 2013). The dominant theme is that, despite increased risk of exposure of non-compliance (Marquis and Qian, 2014), organisations continue to sidestep (Quirke, 2013), resist (Desai, 2016) or comply superficially with regulatory demands (Bromley and Powell, 2012). However, with scholars finding that, under some conditions, organisations may respond substantively (Marquis and Qian, 2014), this assumption is open to question.

This paper seeks to contribute to this debate by drawing attention to recent changes in the way professional services are regulated. Specifically, we focus on the emergence of a diverse range of regulatory instruments belonging to an overarching 'family' (Gilad, 2010: 486) of 'new governance' regulation (NGR) (Ford, 2017). Central to NGR is the idea of moving away from 'rules-based' regulation towards a model which, affording firms the freedom to tailor regulatory demands to local circumstances, envisages a deeper commitment to, and achievement of, regulatory goals (Black 2012). As such, NGR calls into question the assumption that organisations will automatically engage in decoupling. On the contrary, the flexibility inherent in new regulatory instruments may incentivize organisations to develop compliance systems aligned with their own priorities (Meyer and Bromley, 2014).

To explore this possibility, we focus on how solicitor practices in England and Wales have responded to the introduction of outcome-focused regulation (OFR) in 2011. Marking a new era of lawyer regulation, OFR stipulates the ethical and professional standards by which legal services are to be provided but leaves it to legal practices to determine how best to achieve

these. We pose two questions. First, to what extent has the flexibility implied by OFR triggered substantive compliance? Second, how has this process been negotiated and managed internally by firms?

In what follows, we turn to the institutional literature first focusing on decoupling, before exploring the characteristics of NGR in more detail and its potential to elicit responses to regulatory demands that are substantive in nature. Details of the research setting and the qualitative nature of the research design are given next. In the empirical section of the paper, we identify the emergence of a compliance infrastructure, the integration of compliance systems and processes into firms' core operations and day-to-day work routines and practices, and their alignment with commercial objectives. This is followed by a discussion as to the extent to which these responses equate to substantive compliance and how far regulatory goals are being realized.

THEORETICAL FRAMEWORK

Decoupling

Institutional theory has developed increasingly sophisticated models to understand how organisations respond to regulation. A central concept is 'decoupling', a process which occurs when pressure to comply with regulatory mandates conflicts with organizations' primary purpose (Meyer and Rowen, 1977). The tension may be resolved by adopting one of two forms of decoupling assumes two forms: 'policy–practice' and 'means–end' (Bromley and Powell, 2012). The former describes the symbolic adoption of policies without implementing the requisite practices (Bromley et al., 2013). As illustrated by the case of a large financial services firm (MacLean and Behnam, 2010), the latter entails symbolic implementation where elaborate structures and processes are established in response to external demands but their relationship with core tasks is 'weak' (Bromley and Powell, 2012: 3). Building on this distinction, research

has explored ‘the variables that predict or mediate’ instances of decoupling (Boxenbaum and Jonasson, 2017: 85). For example, decoupling is considered to be prevalent in complex or opaque fields where the multiplicity of practices increases ambiguity over how to achieve compliance (Wijen, 2014: 306). Ambiguity also increases the likelihood of organisations deploying decoupling as a strategy to accommodate the interests of multiple internal stakeholders (Meyer and Holler, 2016).

However, organizations do not always engage in decoupling; substantive implementation is also possible. Here, regulatory mandates are aligned with the ‘task-related core of an organization’ in ways that ‘affect everyday decisions and actions’ (Weaver et al., 1999: 540). This is most probable when the risks of detecting non-compliance are high and/or the consequences severe (Marquis and Qian, 2014; Chandler, 2014). Whilst this implies substantive implementation is involuntary and prompted by coercive forces, this may not always be the case. Crilly et al. (2012), for example, found instances of substantive compliance when organizations view this as a source of opportunity. Of the 17 firms in their study, five implemented corporate social responsibility obligations substantively because they viewed this as a tool for generating business and accessing resources.

‘Decoupling risk’ (Marquis and Qian, 2014) and ‘opportunity maximisation’ (Crilly et al., 2012) are two conditions then which may encourage organizations to respond to regulatory demands substantively. But, is it possible that similar opportunities may be present in other situations? In particular, how relevant are ongoing changes in the nature of regulatory regimes such as those associated with NGR? We address this question next.

New Governance Regulation

Since the late 1990s, there has been a move to displace traditional forms of professional regulation with an alternative model, broadly defined as ‘new governance’ regulation (NGR)

(Carrigan and Coglianese, 2011). Although adoption of NGR techniques varies by professional domain and national jurisdiction, examples include principle-based regulation in UK financial services (Black, 2015), its adoption amongst regulators working to financial reporting standards set by the International Standards Accounting Board (Braun et al., 2015), ‘management-based’ regulation directed at incorporated legal practices in Australia (Parker et al., 2010), risk-based regulation of UK physicians (Bostock and Hutter, 2008), and entity regulation of legal practices in Nova Scotia (Semple, 2017).

In contrast to continental Europe (Lane et al. 2002), state involvement in professional regulation has been minimal in Anglo-Saxon jurisdictions. Professional bodies determined professional standards and deployed prescriptive regulation to govern practitioner conduct (Hadfield and Rhode, 2016). However, this model has been subject to considerable criticism in recent years for its failure to prevent professional misconduct (O’Regan and Killian, 2014). In the UK, for example, the Financial Services Authority attributed misspelling and other market misconducts to prescriptive regulation, asserting that the volume, complexity, detailed nature of regulatory rules diverted firm “attention towards adhering to the letter, rather than the purpose of our regulatory standards” (2007: 7). The assumption that prescriptive regulation no longer ‘fit(s) the realities of the new economy’ (cf. Lobel, 2012: 9) is a further driver encouraging the development of NGR. Typically, policymakers argue that in place of complex rules, regulation needs to be flexible, adaptable, and cost-effective (Ford, 2017). The burden on business must be minimal and the efficient operation of ‘self-correcting markets’ not thwarted (Armour et al., 2016). Compared with bright-line rules, new governance regulatory techniques are viewed as better able to meet these aspirations (Ford, 2008).

Insert Table 1 here

A common assumption underlying new governance regulatory instruments is that regulatory outcomes are more likely to be achieved when responsibility is delegated to

organizations for determining how to do so (Black et al., 2007). Regulatory outcomes may be achieved by ‘performance/principle’ or ‘process/management’ approaches (see Table 1 for more detail). Under the former, regulators establish service standards or high-level norms by which organizations are to undertake their activities. Process/management-oriented models seek to achieve regulatory goals by compelling organizations to construct management systems and processes that monitor the risks their operations pose to regulatory objectives and to put in place controls to mitigate (Carrigan and Coglianese, 2016). Whereas the latter techniques focus on the mode of regulation, entity regulation extends the target of regulation to encompass the firms in which practitioners operate (Dodek, 2011).

Firm Responses to NGR: Coupling or Decoupling?

Returning to the concerns raised earlier, it might be argued that NGR will reduce the likelihood of both policy-practice and means end decoupling (Bromley and Powell, 2012). The latter may be harder because in the absence of prescribed rules, organizations are forced to think through how to comply with the provisions of regulatory demands. As well as making it harder to game the system, this increases the prospect of organizations transcending ‘minimal compliance’ (Black, 2008). Under NGR then, the likelihood of *means-end* decoupling may be reduced by giving organisations the flexibility to develop compliance systems which satisfy external stake-holders and are aligned with their core business. However, there is also the possibility that closer relationships between organisations and regulatory agencies may result in co-productions of compliance (see Edelman and Talesh, 2011) and the prospect of regulatory capture (Black, 2008).

Hence, emerging forms of NGR may, by their very design, limit the possibilities for decoupling and instead generate incentives for organisations to engage in more substantive forms of compliance. However, the possibility that ambiguity surrounding “appropriate” implementation’ (Parker et al., 2010) could just as easily lead to classic ‘avoidance’ strategies

should not be discounted. Thus, questions emerge as to how far NGR will trigger classic decoupling responses or substantive forms of compliance?

STUDY CONTEXT: REGULATORY REFORM IN LEGAL SERVICES

To explore the aforementioned issues, we focus on the example of NGR in the context of the solicitors' profession in England & Wales where the regulator, the Solicitors Regulation Authority (SRA), combined three discrete new governance regulatory instruments: outcomes-focused regulation (OFR), entity regulation and risk-based regulation.

The solicitors' profession is (broadly) bifurcated into two sub-fields: large firms advising corporate clients, and smaller, local and regional firms advising private clients. The genesis of OFR can be traced to the high volume of client complaints in the private client market and the failure of the Law Society to deal with these effectively. As complaints continued to rise and public confidence in the profession hit rock-bottom, pressure for reform intensified:

People complain to 'Which?' time and again about the second-rate service they receive from solicitors, often during stressful times. Other professions can't get away with this type of behaviour and it's time for the Government to rein in this complaint-riddled industry (Director of Which? quoted in DCA, 2005: 21).

The government responded by enacting the Legal Services Act, 2007 (LSA), which established a new framework for regulating legal services in E&W. The LSA places a duty on regulators to promote and help realize eight regulatory objectives. Whilst these reflect two ideologies – professionalism and consumerism (Boon, 2010; Semple, 2015) – the Act does not prioritize between the objectives – all assume equal weighting. Nor does it stipulate the instruments by which legal service providers are to be regulated; the decision to adopt NGR or continue with traditional methods is left to the regulators.

The SRA distilled the LSA's eight regulatory objectives into two goals, which it identified to be the purpose of its regulatory role: (a) protecting the consumers of legal services and (b) ensuring that the lawyers and solicitor practices act in accordance with the professional principles set out in LSA (SRA, 2015). Guided by these, the SRA replaced rules-based regulation with OFR, entity regulation, and risk-based regulation.

Outcome-focused regulation, entity regulation and risk-based regulation

The SRA justified the introduction of OFR on two grounds. It believed OFR to be better suited to the liberalized market environment; its inherent flexibility would give 'firms the freedom to innovate' and support them to respond to competition from new providers. The second justification centred on the perceived limitations of prescriptive regulation for fostering a passive ethical culture and, correlatively, the purported strength of OFR to improve standards, protect client interests, and uphold the rule of law (SRA, 2009; 2015).

OFR consolidates professional and regulatory requirements into a single handbook – the *SRA Handbook*. This includes ten, high-level principles, which express 'the fundamental ethical and professional standards' expected of practitioners and firms (SRA, 2010b). The Handbook also includes a series of mandatory outcomes, which define standards of service expected from providers and obligations owed to clients, the regulator, third parties. Further outcomes focus on effective and efficient management of the business (SRA, 2010).

Firms' mandatory appointment of compliance officers for legal practice (COLP) is the second feature of OFR. COLPs are responsible for ensuring management systems are in place for the firm and its employees to be able to comply with statutory obligations and the terms and conditions of their practices' license to operate.

To complement OFR, the SRA introduced entity regulation and changed its enforcement approach to risk-based regulation. The former extends the unit of regulation to

encompass firms whilst the latter directs SRA's attention on issues and firms that it considers pose the greatest risk to achieving regulatory objectives (SRA, 2014).

RESEARCH DESIGN

We designed an inductive, qualitative study to explore organizational responses to OFR and drew on multiple data sources to investigate core research questions. First, documentary sources were used as a knowledge resource and a means of data triangulation (Bowen, 2009). Three types of documents were examined, each performing a different function. Our starting point was an analysis of OFR-specific documents (business plans, policy statements, consultations, guidance) produced by the SRA and LSB. These provided insights into regulators' perceptions of the purpose of regulation and standards of conduct expected from practitioners and firms. We also studied decisions made by the LeO as a rough proxy for the level of complaints in each firm. Lastly, research commissioned by the SRA and others relating to firms' experiences of regulation (e.g. SRA, 2013) was used to understand the implications of OFR. Analysis of archival material enhanced our credibility amongst informants (Harvey, 2011), helping to improve the quality of interview data (see below).

Our second data source comprised 24 semi-structured interviews with COLPs. These were staged over two periods: September to December 2013, and then January to March 2014. During the former, interviews were confined to COLPs in ABSs because we were interested in how their responses to OFR might be shaped by their non-traditional structure. In phase two we extended the sample to include COLPs operating in traditional law firms. All interviews were recorded and fully transcribed. In addition, discussions took place with senior officials at the SRA both before and after the main fieldwork. Follow up interviews were also conducted with four informants, bringing the total number of interviews to 29. Table 2 presents a summary profile of the study sample whilst Appendix 1 gives details of each firm.

[Insert Table 2 here]

Given their centrality to the implementation of OFR, we chose COLPs as our primary informants. We sought to include the perspectives of other organizational actors but were denied access. Methodologically, a homogeneous sample such as ours presents limitations. However, we believe these to be offset (in part) by the openness of most informants (revealing anxieties, tensions and disagreements regarding implementation) and the seniority of respondents, most of whom were able to comment on wider strategies of their firms. We also discussed emergent findings in several forums organized by regulators (e.g. SRA, May 2016; International Bar Association, July 2016), allowing us to garner alternative views on the nature and practical impact of OFR.

Turning to sampling, we sought to employ ‘heterogeneous’ (Robson, 2002) and ‘critical case’ (Patton, 1990) logics. The former aims to capture the diversity in a given population in terms of size, specialism, and geography (see Table 2), while the latter aims to include cases that are theoretically interesting. In the first phase interviewees were selected using the online register of ABSs maintained by the SRA. Of the total ABS population, which totalled 169 entities at that time (August 2013), we identified a subset of 75 firms of interest, with 15 firms eventually agreeing to participate in the study. In this sample we included a mix of non-traditional firms, some of which had not previously regulated by the SRA. In the second phase, the sampling frame comprised legal practices based in Yorkshire, mainly for practical reasons, although efforts were made to capture population diversity (for instance with regard to size). We contacted 30 firms and secured interviews with nine of them.

In terms of interview content, we began by asking informants for background information on themselves and the firm. Open-ended questions were then used to explore how informants came to be appointed as their firm’s COLP, the changes they needed to make to

respond to OFR (if at all), any challenges they experienced in doing so, and the nature of their interaction with the SRA.

As a third primary data source, we mined data from the internet, focusing specifically on firms' websites both before and after interviewing. Pre-interview, a review of websites proved to be useful for obtaining a historical narrative, although the type and level of information given varied greatly. Post-interview, we reviewed the websites against five indicators to ascertain what this may convey about firms' approach to compliance/professional obligations. The five indicators included: the identification of COLPs, details of a complaint procedure, mission and/or values, and corporate social responsibility and other activities providing insight into how firms viewed compliance/professional duty.

Data analysis involved a mix of deductive and inductive strategies: the deductive elements focused on categorizing aspects of the data in accordance with the literature on symbolic and substantive compliance. Content analysis and an adaptation of grounded theory analytical techniques (Gioia et al., 2011) were employed to identify theoretical dimensions addressing the research questions. Moving back and forth between the data and the literature, and facilitated by NVivo-10-software, our analysis unfolded over two stages.

First, we sought to gauge the level of investment made by firms in their response to OFR and how this varied by firm size. This required us to code, segment and group data according to categories associated with the development of compliance functions (the COLP role) and management systems (including monitoring, risk management and formalisation). We used the 'matrix coding' function on NVivo to compare the responses by firm size.

As per the study aims, our second issue of interest centred on ascertaining the degree to which enactment of OFR was symbolic (implying decoupling) or substantive (Weaver et al. 1999). Here we undertook fine-grained analysis of the data to specify the discrete activities

associated with the implementation of OFR, whether they intended to buffer core operations or if they were being embedded into firms' management systems and processes. We then sought to establish the mechanisms by which this occurred and classified the data into two '*integration strategies*', the tactics by which firms sought to align OFR with their own goals.

RESEARCH FINDINGS

The research findings are presented in two sections. The first details organizational responses to OFR and the emergence of a compliance infrastructure. The second explains ways in which firms sought to integrate compliance systems within work activities and their alignment with commercial objectives.

Compliance Infrastructure: Continuities and New Functions

Firms in this study did not perceive OFR as necessitating radical change. The new regime did not (for the most part) introduce a swathe of new professional and statutory obligations but imported these from the Solicitors Code of Conduct. Compliance processes in some shape and form were therefore already in place. Indeed, most informants stressed that OFR merely formalized practices already being undertaken by 'well managed' firms (LP23). Corporate law firms for whom sophisticated financial and management systems were viewed as essential for safeguarding their "professional reputation" (LP20) emphasized minimal change the most.

Although the professional obligations under OFR did not change substantively, it introduced new mandates relating to business and risk management whilst entity regulation extended these requirements to firms. The study sample responded by establishing a compliance infrastructure.

The Compliance Function

Central to the establishment of a compliance infrastructure was the appointment of a COLP – practitioners registered with the SRA as formally accountable for ensuring processes are in

place to comply with the SRA Handbook. COLP appointments were made at senior levels with the role assigned to partners in all but four cases. This helped ensure compliance-related decisions would be acted upon and minimized potential resistance to new practices. Appointing those in leadership positions as the COLP was also a means by which firms signalled their commitment to compliance to external stakeholders (see below).

Actors designated as the COLP did not always undertake the work associated with their role. In four firms (three large and one small) for instance, COLPs delegated day-to-day activities to others but retained responsibility for substantive decisions relating to compliance (e.g. how to interpret the Code of Conduct, when and if to report transgressions to the SRA). Contrastingly, COLPs in seven firms assumed responsibility for all compliance related activities but, in doing so, no longer had a fee-earning role. In a third group comprising small and medium-sized firms, COLPs combined compliance duties with fee-earning as it was neither economically viable nor necessary for the position to be full-time.

The Development of Management Processes & Systems

Introducing new management systems or modifying existing ones was a second feature of the compliance infrastructure established by study participants. Seeking accreditation from the Law Society's quality assurance mark – *Lexcel* – was a principal means by which they did so. Indeed, at the time of fieldwork, half of the study sample (four small and eight large firms) had become *Lexcel* accredited or were working towards this. For firms, the primary appeal of using *Lexcel* is that it assembles the necessary guidance, checklists and other material in one place to comply with all aspects of OFR. Essentially, *Lexcel* accreditation offered a simple, one-step solution for having in place effective business management systems expected by the SRA and other processes and practices to comply with the demands of OFR.

Turning to file reviews, these constituted a prominent example of the change engendered by OFR. Under the new regulatory regime, the primary purpose of file reviews was to assess the extent to which fee-earners followed new compliance protocols, and whether the administrative tasks associated with case management had been undertaken. As file reviews form a critical component of the firm's evidence base demonstrating compliance, extant processes were tightened and their frequency increased.

Managing and mitigating risks is a further activity, not wholly new, but assuming greater importance under OFR. The data reveals four key aspects of risk management: (i) the formation of new structures such as the Governance and Risk Management Committee established by a practice in the North West specializing in personal injury; (ii) the development of new roles and *posts* – 'Risk and Compliance Manager' and 'Director of Risk' are two such examples; (iii) new procedures to identify, monitor and record levels of risk such as 'risk registers'; (iv) modification of extant practices such as increased frequency of risk assessments.

Monitoring/reducing complaints is another important example illustrating a modification of existing processes but, also organisational variation. The SRA uses data on complaints as one indicator to assess professional standards and the quality across the firm population. At firm level, excessive or unresolved complaints may trigger an investigation. Although complaint monitoring was not new under OFR, it had, reportedly, become more systematic and commanded a highish priority amongst firms operating in the private client market – certainly more than corporate law firms. Variation in the importance attached to complaints is reflected on firms' websites. Of the eight providing details of a complaints procedure (see Table 2 in the Appendix), six operate in the high-complaint specialisms.

Documenting Compliance

OFR is intended to move away from a 'tick-box' approach to compliance. From the perspective of the SRA, this requires organizations to demonstrate compliance (SRA, 2010d). This requirement is wide ranging, including file reviews, monitoring complaints, assessing risks, recording breaches with the Code of Conduct and even training plans. As such, informants stressed the need to evidence compliance as one of the biggest changes associated with OFR. The COLP at a national firm based in Yorkshire put it like this:

There's a lot of documentary evidence that the SRA require nowadays and I think they don't realize how time-consuming it is... [There's] a lot of stuff that you have to do in the background all the time you know, if the SRA dropped in now, they'd want to see a risk register, they'd want to see a compliance plan. They'd want to see your monthly COLP report, your internal breaches...(LP15).

In addition to assessing the effectiveness of firm processes (e.g. via file reviews), COLPs keep a record of queries relating to regulation and how these were addressed. Firm decisions which raise regulatory issues are also recorded. Overall, informants stressed that maintaining an audit trail is one of the most significant and onerous aspects of OFR.

Beyond (means-end) decoupling: Capitalizing Regulation

This section details two strategies by which firms sought to integrate compliance across work structures and daily activities. One strategy focused on the business benefits of doing so whilst the other sought to meet regulatory demands without minimizing productivity.

Framing and Rationalizing Compliance

Resonating with findings from the wider regulatory literature, COLPs sought to justify the investment in compliance by connecting these systems with commercial goals in several ways.

First, they emphasized the damage to firm reputation and the financial costs of non-compliance. Whilst this included compensation, increased insurance premiums, and regulatory fines, a loss in future earnings was identified to be the most significant cost of all. In this regard, compliance was often equated with providing a quality service and/or meeting clients' expectations. It is useful to give a quote from an international corporate law firm to illustrate that the commercial repercussions associated with non-compliance or poor service was an issue that firms of all types wished to avoid.

We're concerned about stuff we get wrong that costs us money, or has an impact on our reputation and we were monitoring that already [i.e. before OFR]... in firms of this ilk, complaints of poor service – we're not a high street firm....poor service is not something that happens. We're in a very competitive environment where the majority of our clients are repeat clients...and obviously, they go off us if we get things wrong in terms of our service delivery...and either we rectify or we don't get back on their panel next time round. There's an economic/commercial outcome if we don't get it right or meet the client's expectations (LP20).

The opportunity to *enhance* firm reputation was a further way in which COLPs sought to make the business case for compliance. As well as addressing demands of other external referents, specifically professional indemnity insurers and banks, compliance infrastructures signalled the practice to be 'well managed' and trustworthy. The knock-on benefits of being perceived as a 'well-run' business are captured by a managing partner of a regional firm:

...the reason we've tightened up [management] practice and are addressing risk is because we need to be a well-run business because of the stakeholders. Our insurers need to know we're well-run so it keeps the premiums...And then if you're a decent-run firm you're more likely to attract better staff....

And if you're a well-run firm and you've got a reputation in the town, you're more likely to attract the clients direct as well. So it all fits together (LP14).

For firms in this study, regulatory compliance helped establish a positive feedback loop, which supported firm success.

The potential to improve operational control was the second way in which COLPs framed compliance as an opportunity. Described as 'an early warning system' by one respondent (LP19), monitoring complaints and undertaking file reviews often drew attention to potential issues that could become liabilities. Early detection enabled issue resolution and, importantly, prevented professional negligence claims and/or reduced complaints. File reviews were singled out for supporting financial management as they detected bad debt for example.

Following on from this, the data shows that compliance systems provided new opportunities for managers to monitor professional work and, consciously or not, were being deployed to do so. For example, one informant discussed the practice of undertaking "flash audits", that is, reviewing files notifying fee-earners in advance. Another explained that supervisors were using new IT system to gauge productivity without fee-earners even being aware of this:

We've got a computerised case management system, so the supervisors can go into anybody's files....if they go in and see that there's been no activity on this file for two months or something, well what's going on there? (LP12).

The data also revealed that professional practice was being monitored via compliance systems for two reasons: (i) to verify fee earners usage of compliance processes and systems to undertake the administrative aspect of their role; (ii) to gauge productivity and assess billing schedules were up to date. Notably, compliance systems were not being deployed to ascertain professional standards.

Integration without Disruption

Whilst firms in the study sample wished to comply substantively with the demands of OFR, they were also keen to ensure that this did not impede realization of their core (commercial) goals and, in particular, fee-earner productivity. To reconcile these two potentially conflicting goals, firms invested in new technology or modified existing systems to automate work the administrative aspect of client engagement and case management processes. As the following respondent explains, case management software systems included automatic prompts to inform fee-earners of the administrative tasks they needed to undertake:

So, for example, when a fee earner sets up a new matter for a new client, there's certain things that they have to do, and as a result of doing that, that ticks quite a few of our [compliance] boxes. So not only do they have to send an engagement letter, but they also have to fill in a risk questionnaire, which asks for certain things... So everything comes up automatically...(LP5).

By simplifying regulatory obligations to a checklist of activities, this made it easier for fee-earners to comply with OFR and helped overcome perceptions of the new regime as 'an obstacle to them doing their job' (LP10).

Designating COLPs as the firms' principal agents for compliance was the second way in which firms sought to reconcile regulatory demands without adversely productivity. Specifically, firms did not expect fee-earners to have detailed knowledge of the Code of Conduct or keep up to date with changes to the Handbook. Regulatory developments were communicated on a 'need to know' basis so as not to detract fee-earners from billable work. Whilst this practice kept compliance systems aligned with core commercial objectives, a few informants suggested that there was a risk of fee-earners abdicating responsibility to COLPs

on how to apply professional principles to their work. An informant at international law firm put it like this:

I think there's a danger about outcome-focused regulation that the average lawyer is less aware of their ethical and regulatory duties. You see, when I was growing up as a lawyer, we all had our Handbook...Now ... because we do centralise so much that the average lawyer probably doesn't think about these things as much as they used to (LP23).

The concern here was that by allowing firms to adapt compliance infrastructures in ways that suited them, OFR might be leading to the 'in sourcing' of professional obligations (Legal Futures, 2016). This risk was seen to be exacerbated by the complexity of professional conduct rules and the difficulties practitioners face in understanding what is required of them.

DISCUSSION

The research findings raise three critical questions: (i) what new practices did organizations adopt in response to NGR? (ii) to what extent do these constitute substantive compliance? (iii) is OFR realizing the consumer protection and legal professionalism goals envisioned in the LSA? The short response to these questions is that resourcing actors to undertake compliance, the integration of compliance systems into work structures and activities, and the auditing of compliance are developments triggered by OFR. When assessed against the theoretical concepts, organizational responses to the SRA's regulatory strategy equate to substantive compliance. Despite this, LSA's goals of consumer protection and legal professionalism have only partially been realized at best. OFR may have played a role in improving consumers' experience of legal services, but the corporatist nature of the SRA's

regulatory strategy (Boon, 2017) appears to be eroding legal professionalism. We elaborate on each of these responses.

The research findings revealed that responses to OFR often augmented or formalized pre-existing processes with large firms in particular, emphasizing management control systems were already in place. Nonetheless, several developments are triggered by the SRA's regulatory strategy. This includes the financial resources devoted to compliance activities and, in particular, the role and function of the COLP. Whereas investment in IT comprise one off costs, resourcing the COLP role represents a sustained cost. OFR increased the frequency of, and systematized the processes by which activities such as file review or complaint monitoring were undertaken. Organizations were also institutionalizing new practices such as the maintenance of risk registers. Importantly, these developments highlight the impact of the *combined* demands of OFR and entity regulation. The risk of losing the license to operate helps explain ongoing reviews of compliance and management processes, and the emphasis placed on verifying fee-earner follow compliance protocols.

Auditing compliance systems and maintaining records is new to OFR. Although legal practices have been given the freedom to tailor regulatory responses to suit the markets in which they operate, the wider accountability and transparency sensibility (Power, 1997) pervading professional services requires them to be ready for an SRA inspection at any point and demonstrate compliance protocols have been followed. This is different from rules-based regulation where the onus was on the regulator to demonstrate infractions.

We contend that organizations responded substantively to the SRA's regulatory strategy. The development of *integration strategies* which sought to link compliance systems to firms' commercial objectives is arguably one of the clearest manifestations of substantive compliance.

Even though organizational responses to the SRA's regulatory strategy may be characterized as substantive compliance, this has not contributed to substantive realization of the LSA's goals of consumer protection and legal professionalism. The evidence suggests that whilst OFR may have played a role in improving consumers' experience of legal services, the corporatist nature of the SRA's regulatory strategy appears to be eroding legal professionalism.

Taking the issue of consumer protection first whilst a direct comparison of data on lawyer default pre- and post-OFR is not possible (see Boon 2016a for discussion of methodological issues), the quantitative data is very positive. Thus, the number of 'allegations upheld' declined from over 1400 in 2007 to 400 in 2017 whilst the number of cases referred to the Solicitors' Disciplinary Tribunal also declined, from 525 in 2007 to 117 in 2017 (SRA, 2018; Boon, 2017). Moreover, the Legal Ombudsman has suggested that, since the complaints it deals with are primarily of a 'complex' nature, this indicates that legal practices are better at addressing the more 'straightforward' issues (LeO, 2018: 8). However, Boon is sceptical as to whether the introduction of OFR is the main reason for the decline in lawyer default suggested by the SRA's figures, stating, "it is difficult to believe that it [OFR] immediately and consistently led to a reduction of offences worthy of sanction" (2017: 6791). He puts forward three hypotheses to explain the positive statistics, which includes prosecuting fewer serious matters because of the difficulty in using the outcomes in the Code of Conduct in misconduct cases. Findings from research on consumers' experience of legal services also question whether improvement in lawyer default is as extensive as that indicated by the SRA's data. For instance, one study found that the majority of consumers making a complaint sought further redress from the SRA or LeO because of their dissatisfaction with law firms' complaint-handling processes (London Economics, 2017). A separate study revealed that client care letters remain mostly ineffective at conveying the information consumers prioritize and, often written in a tone lacking empathy,

are a tangible expression of the “uneven relationship between legal services providers and their consumers” (Optimisa, 2016: 16).

So what conclusion do we reach regarding the realization of the consumer protection goal under OFR? Our view is that, compared with the quality and standard of service consumers received in the years running up to the introduction of the LSA, their experience of accessing legal services has, on balance, improved. By introducing entity regulation and making organisations the primary target of enforcement (Boon, 2017), the SRA’s regulatory strategy appears to have improved the management of legal practices and possibly contributed to a decline in lawyer default numbers. Specifically, OFR may have helped reduce complaints preventable by appropriate office management systems. That being said, the possibility that better business management has occurred in anticipation of intensive competition following market liberalisation should not be discounted.

Turning to the realization of the second regulatory goal, to recall, the LSA places a statutory duty on the regulated community to abide by the professional principles. These encapsulate the core elements of legal professionalism and require lawyers to uphold the rule of law and to act with independence and integrity. Put differently, they are duty-bound to ensure their professional judgements are independent of client pressure, the commercial interests of the firm, and self-interest (Dinovitzer et al., 2015). In this regard, a good barometer by which to assess realization of legal professionalism is to consider the extent to which corporate lawyers are better able to withstand client pressure following the introduction of OFR.

Results from studies of corporate law firms and lawyers’ understanding of their professional obligations under the Code of Conduct are not positive. One study of lawyer-client relationships found practitioners’ understanding of the concept of independence to be ‘poor’ with some lawyers suggesting that they are not independent nor do clients expect them to be. This may be attributable to several reasons but the researchers drew attention to the “limitations

of definition of independence in the SRA Handbook,” which fails “to account for many of the complexities and nuances of independence in today’s large legal practices” (Coe and Vaughan, 2015: 2). In other studies, lawyers drew on the standard conception of lawyering to distance themselves from professional and ethical obligations. Thus, described as ethnically minimalistic, lawyers in Moorhead and Hinchly’s study viewed client interests as pre-eminent and the public interest with a sense of ‘weariness’ (2015). Likewise, Vaughan and Oakley found corporate finance lawyers to be “disinterested and unconcerned about the ethics of what they and their clients were doing” (Vaughan and Oakley, 2016: 71). It is probable that corporate law firms in the aforementioned studies have in place sophisticated compliance and risk management systems that the SRA would regard as ‘compliant’. Accordingly, these studies serve to highlight that whilst firms’ systems and processes may be compliant, these do not counteract client power and a heightened ethos of commercialism. In short, complying substantively with the SRA’s regulatory strategy does not lead the realization of legal professionalism. How do we account for this?

We attribute the disconnect between substantive compliance and the realization of legal professionalism to the corporatist nature of the SRA’s regulatory strategy (Boon, 2017). It is premised on the belief that effective business management (based on proper governance and robust financial and risk management principles) will contribute to client satisfaction, minimize liabilities, and foster resilience. As such, the focus is on organizations and their compliance with regulatory and statutory obligations. Conversely, the SRA’s strategy does not lay emphasis on fostering normative commitment to professional values and virtues as the basis of professional conduct. Indeed, the managerial rationality inherent within the SRA’s corporatist regulatory strategy reinforces a lawyering mentality “focused on commercial and managerial rationality rather than value rationality and ethical judgment” (Parker and Rostain, 2012: 2361).

CONCLUSION

This study makes several contributions to the extant literature. Our study develops understanding of the antecedents of decoupling and coupling (Boxenbaum and Jonasson, 2017; Bromley and Powell, 2012) by focusing on the nature and form of regulation as a critical explanatory variable. A dominant theme within the institutional theory literature is that organizations respond to regulation by decoupling or, if their responses are substantive in nature, this is involuntary, driven by a fear of loss of legitimacy. Taking the solicitors' profession in England and Wales as an illustrative example, this paper sought to assess whether the flexibility inherent within NGR overcomes these challenges and whether organizational responses are driven not by coercive pressure but a substantive commitment to regulatory goals. Findings show that, whilst changes in the nature of regulation may increase the likelihood of substantive change, economic and social motives (Parker and Nielsen, 2012) remain the primary drivers. Coercive isomorphism, therefore, still holds true.

A related contribution is towards understandings of the internal management of regulation by organisations (in our case, law firms). Although there are now many studies focusing on the wider issue of institutional complexity (Wijen, 2014), 'Empirical research on the regulatory compliance behaviour by firms is difficult and rare' (Malesky and Taussig, 2017: 1761). This study helps to develop understandings of this 'compliance behaviour' in two ways. First, is to highlight the importance of integration strategies. According to Bromley and Powell (2012: 36) more research is needed on 'bottom-up or bootstrapping practices, in which organizations relate external demands more directly to their daily activities'. The case of legal services highlights a range of possible 'bootstrapping practices' (see above) and also reveals multiple drivers for these practices. As we saw, in part they were motivated by a desire to align compliance work with the strategic priorities of firms, in turn made possible by the flexibility inherent in OFR. However, the need actively manage integration (through bootstrapping) was

also a response to the tensions generated by this regulation, especially those associated with increasing administrative costs. In our own case, rather than engage in decoupling or ‘substitution’ (Okhmatovskiy and David, 12) firms sought to deal with these tensions through greater integration.

Second, our analysis illustrates that substantive compliance does not guarantee the realization of regulatory goals. We found evidence to suggest that while firms had engaged substantively with the businesses management aspects of regulation, the goal of legal professionalism was being undermined. In part this was a result of the ‘integration strategies’, which sought to minimise disruption to fee earning solicitors. By centralising as much compliance work as possible in the hands of the COLP, law firms were arguably undermining the involvement of individual professionals. Framing ‘compliance’ in terms of management *systems* and risk management *processes*, may also undermine practitioners’ knowledge of the principles and rules of professional conduct and the ability to recognize ethical issues. As such, our findings chime with Misangi’s (2016) observation that regulatory demands may lead to a ‘concurrence of couplings and de-couplings’. They also highlight the unintended consequences of integration or ‘bootstrapping’ practices. While these may align firm and regulatory goals in one domain, they may inadvertently exaggerate de-coupling in others.

Of course, when drawing these conclusions, it is important to note certain caveats and directions for future research. As we have noted already (boundary conditions), it would be useful to explore further the possible impact of different approaches to NGR and how these play out in different professions, such as accounting or finance and national contexts. Future studies might also benefit from improved access to documentary data from firms and interviews with a wider range of stakeholders, including senior partners and practicing solicitors. Especially useful here would be to track firm practices over time to explore how firm level responses to regulation evolve and change.

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Table 1: A Typology of Regulatory Instruments (adapted from Gilad, 2010).

	Prescriptive	Performance/Principle-Oriented	Process/Management-Oriented
Regulatory foci & nature of rules & standards	Detailed specification of required actions	Clear articulation of goals or outcomes	Specifications guiding analysis of risks org'zl operations pose to regulatory objectives
Adaptability of rules & standards to individual circumstances	Limited – rules are uniform and difficult to change	High — outcomes tailored to individual context	High – systems and controls tailored to individual context
Regulatees' commitment & internalization of regulation	Low – externally prescribed rules may be seen as unreasonable / irrelevant	High – autonomy to determine how to achieve outcomes fosters buy-in	High – autonomy to determine how to design systems fosters buy-in
Regulatees' ability to innovate and extract private gains	Low – prescriptive rules leave little room for innovation	High – setting outcomes enable innovation and flexibility	High – setting outcomes enable innovation and flexibility
Compliance determination	Adherence to detailed rules	Achievement of outcomes	Assessment of efficacy of plans to monitor & manage risk
Enforcement style	Reactive to violations	Proactive, emphasis on prevention	Proactive, emphasis on prevention
	Deterrence, adversarial & punitive	Learning-oriented over punishment	Learning-oriented over punishment

Table 2: An Overview of the Study Sample

Firm characteristic		No in sample
Business structure	ABSs	13
	Non-ABSs	11
Firm size as measured by number of solicitors	Small (less than 10)	4
	Medium (11 to 80)	9
	Large (81 and over)	11
Legal aid contract		2
Practice area: Mainly [but not exclusively]	Mainly private client	14
	Mainly commercial – inc. public and third sector	7
	Niche, boutique or specialist	3
Location	London	7
	Regional	17
International		2

Appendix 1:

Table 1: A Profile of Legal Practices

	Firm type	Headquarter location	No of offices	Size – No of partners	Size – No of solicitors	Market
LP 1	ABS	London	1	SP	4	Specialist private client
LP 2	ABS	North West	1	26-80	34	National, private client
LP 3	ABS	London	1	11-25	14	Boutique, high net worth individuals, litigation, dispute resolution
LP 4	ABS	North West	6	26-80	98	Specialist corporate & commercial, general insurance.
LP 5	ABS	Midlands	7	5-10	175	Multidisciplinary
LP 6	ABS	South East	1	2 to 4	2	Private client, probate
LP 7	ABS	North West	1	5 to 0	80	National, personal injury & claims management
LP 8	ABS	London	1	2 to 4	6	Specialist, corporate & commercial, health & social care
LP 9	ABS	Yorkshire	13	26 to 80	106	National, comprehensive private client
LP 10	ABS	London	15	81 & over	315	National, comprehensive private client
LP 11	ABS	North West	9	5 to10	100	National, comprehensive private client
LP 12	ABS	London	4	SP	44	National, commercial, private client, legal aid
LP 13	ABS	North West	2	2 to 4	25	Commercial, contentious & private client
LP 14	Non-ABS	Yorkshire	4	5 to 10	8	Regional, commercial & private client
LP 15	Non-ABS	Yorkshire	2	26 to 80	60	National, corporate & commercial, private client
LP 16	ABS	North West	10	81 & over	480	National, corporate & commercial, private client
LP 17	Non-ABS	Yorkshire	2	5 to 10	20	Local, private client
LP 18	Non-ABS	Yorkshire	11	11 to 25	64	Local, commercial & private client
LP 19	ABS	Midlands	7	81 & over	271	International, corporate
LP 20	Non-ABS	London	18	81 & over	1,070	International, corporate
LP 21	Non-ABS	Yorkshire	4	5 to 10	40	Local, commercial & private client
LP 22	Non-ABS	Yorkshire	1	81 & over	156	National, corporate & commercial
LP 23	Non-ABS	London	9	81 & over	977	International, corporate & commercial
LP 24	Non-ABS	Yorkshire	1	5 to 10	15	Local, specialist, criminal, legal aid

